

No. 17-658

IN THE
Supreme Court of the United States

ROD BLAGOJEVICH,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF FOR *AMICUS CURIAE* THE CENTER
ON THE ADMINISTRATION OF CRIMINAL
LAW IN SUPPORT OF PETITIONER**

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IDENTITY AND INTEREST OF AMICUS CURIAE¹

The Center on the Administration of Criminal Law (the “Center”), based at New York University School of Law,² is dedicated to defining and promoting good government practices in the criminal justice system through academic research, litigation, and formulating public policy. The Center regularly participates as amicus curiae in cases raising substantial legal issues regarding interpreting the Constitution, statutes, regulations, or policies. The Center supports challenges to practices that raise fundamental questions of defendants’ rights or that the Center believes constitute a misuse of government resources in view of law enforcement priorities. The Center also defends criminal justice practices where discretionary decisions align with applicable law and standard practices and are consistent with law enforcement priorities.

The Center files this amicus brief out of concern that the Circuit conflict raised by the Seventh Circuit’s sentencing decision will create substantial disparities in how judges discharge their sentencing obligations pursuant to the factors set forth in 18 U.S.C. § 3553(a).

1. Pursuant to Supreme Court Rule 37.6, counsel for Amicus Curiae represents that none of the counsel for any party, nor any person or entity other than Amicus and its counsel, authored any part of this brief nor made any monetary contribution intended to fund the preparation or submission of this brief. In accordance with Rule 37.2, timely notice was provided to counsel for petitioners and respondent, and both have consented in writing to the filing of this brief.

2. No part of this brief purports to represent the views of New York University School of Law, or of New York University, if any.

This is an issue of great importance, because proper application and consideration of the § 3553(a) factors acts as an important check on the sometimes harsh sentences prescribed by the Sentencing Guidelines, as well as on prosecutors' considerable discretion relating to charging, plea- and fact-bargaining, that can themselves give rise to sentencing disparities among similarly situated defendants.

SUMMARY OF THE ARGUMENT

The Seventh Circuit's sentencing decision in this case – holding that a district court that imposes a within-Guidelines sentence need not consider the risk of unwarranted sentencing disparities between the defendant and other similarly-situated defendants because the Guidelines themselves account for such disparities – raises an especially important issue for this Court to address. Empirical studies of sentencing practices have shown that where courts of appeals require district courts to state the reasons for their sentences pursuant to 18 U.S.C. § 3553(a) – including consideration of the need to avoid unwarranted disparities – sentencing outcomes often change, and result in a criminal justice system that is less harsh, fairer, and administered with greater equity across different categories of defendants. Thus, the Seventh Circuit's contrary rule threatens not only uniformity of the law, but also the fair and equitable administration of criminal justice throughout the nation.

Moreover, it is clear that the Seventh Circuit's decision is error. Its holding not only contravenes the clear mandate of Congress, as codified at 18 U.S.C. § 3553(a)(6), it also disregards this Court's precedents and the overall

sentencing scheme this Court has endorsed since *United States v. Booker*, 543 U.S. 220 (2005). The decision below thus exacerbates a circuit split that this Court should grant certiorari to resolve. Accordingly, the Court should grant the petition and reverse the decision below.

ARGUMENT

This Court’s post-*Booker* caselaw has made clear that sentencing courts must consider, in addition to the Guidelines promulgated by the United States Sentencing Commission, the factors set forth in 18 U.S.C. § 3553(a). These include, broadly, “the nature and circumstances of the offense and the history and characteristics of the defendant,” the purposes of sentencing, and, as relevant here, “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” In *Rita v. United States*, 551 U.S. 338 (2007), this Court outlined the “*double determination*” required of sentencing courts and the Sentencing Commission, noting that each has an *independent* obligation to ensure that sentencing outcomes are consistent with § 3553(a). *Id.* at 347 (emphasis added). The Court noted that the sentencing judge “may hear arguments by prosecution or defense that the Guidelines sentence should not apply . . . perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless.” *Id.* at 351. Whether or not the sentencing judge decides to vary from the advisory Guidelines range, however, this Court has left no doubt that the sentencing regime promulgated by Congress and elucidated by this Court’s precedents requires the district court to conduct an individualized

assessment of the defendant and the application *vel non* of each of the § 3553(a) factors to her case, including the need to avoid unwarranted disparities between the defendant and similarly-situated offenders.

In this case, the Seventh Circuit relieved the sentencing court of its obligation to consider the statutory factors and thus abandoned the “double determination” required by this Court. Petitioner argued below that the district court had failed to consider his argument that his 168-month sentence created, rather than avoided, an unwarranted disparity as among sentences of similarly situated defendants convicted of political corruption. *See United States v. Blagojevich*, 854 F.3d 918, 921 (7th Cir. 2017). The Seventh Circuit rejected that argument because, it reasoned, “the Sentencing Guidelines are themselves an anti-disparity formula.” *Id.* Thus, the court held, although the sentencing judge did not consider petitioner’s argument, in imposing a within-Guidelines sentence, the judge “*necessarily* [gave] significant weight and consideration to the need to avoid unwarranted disparities.” *Id.* (quotation omitted).

The court cherry-picked the immediately foregoing language from this Court’s decision in *Gall v. United States*, 552 U.S. 38 (2007), which, read in isolation, suggests that in calculating the Sentencing Guidelines range, a sentencing judge necessarily considers disparities for which the Sentencing Commission has already accounted. *Id.* Thus, the court held, “[t]he district judge gave a sentence within the revised Guidelines range he constructed . . . and therefore did not need to discuss § 3553(a)(6) separately.” *Id.*

A. The Sentencing Question Raised by the Petition Is an Especially Important One for This Court to Address

The sentencing issue raised by this case is especially important in its implications for uniformity of the law and fair sentencing practices among the federal courts. Indeed, the rule articulated in the decision below demands correction because it undermines what experience and empirical study have shown about sentencing outcomes since *Booker*. A study first conducted in 2010 and revised and updated through August 2016 analyzed sentences imposed on *remand* after Guidelines sentences had been vacated on appeal for failure to consider the defendant's non-frivolous § 3553(a) arguments. See Jennifer Niles Coffin, *Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation*, available at https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/where-procedure-meets-substance-making-the-most-of-the-need-for-adequate-explanation.pdf (the "Study"). The Study found that 58.1% of sentences imposed on remand were less severe than the within-Guidelines range sentence originally imposed. *Id.* at 18.³ Thus, district courts' mandatory consideration of the § 3553(a) factors has important, real-world consequences: In a majority of cases, it results in a less severe sentence than is imposed where courts blindly follow the Guidelines.

It is perhaps unsurprising that this is the case since numerous factors that are considered not relevant or not

3. That percentage was even higher – 73.7% – for non-Guidelines sentences, though that category represented a smaller sample size. *Id.*

ordinarily relevant to sentencing under the Guidelines have been repeatedly deemed by courts to be highly relevant to their consideration of the personal history and characteristics of the defendant and whether the sentence is sufficient or greater than necessary to serve the purposes of sentencing. *Compare* U.S.S.G. § 5H1.6 (“Employment record is not ordinarily relevant in determining whether a departure is warranted.”) *with United States v. Bannister*, 786 F. Supp. 2d 617, 687 (E.D.N.Y. 2011) (noting, among other factors, defendant’s “efforts to hold lawful employment” as a basis for concluding that ten-year mandatory minimum sentence was greater than necessary to achieve purposes of sentencing); *compare* U.S.S.G. § 5H1.6 (“family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted”) *with United States v. Howe*, 543 F.3d 128, 132 (3d Cir. 2008) (affirming below-Guidelines sentence of three months’ probation where defendant was “a devoted husband, father, and son”). The real-world experience of sentencing judges reflects that factors they consider highly relevant – and that Congress had the wisdom to include in their sentencing determinations – are left out of the Guidelines calculation entirely.

Sentencing disparities are such a factor. Ten of the cases cited in the Study turned on the district court’s initial failure to make an individualized assessment of each defendant and consider him *vis a vis* similarly-situated defendants, and in each of these cases, the district court on remand imposed a lesser sentence when it explicitly considered the need to avoid unwarranted disparities. *See* Appendix.

In *United States v. Friedman*, 658 F.3d 342 (3d Cir. 2011), for example, the defendant was convicted of bribery with two co-defendants – the public official to whom the bribe was paid and another individual who paid the same official a bribe. *See id.* at 363. Those co-defendants were sentenced to 24 months’ imprisonment and three years’ probation, respectively. *Id.* The district court imposed a Guidelines sentence of 34 months without meaningfully addressing the defendant’s argument that such a sentence would create an unwarranted disparity with the sentences his co-defendants received. *See id.* (“The District Court’s only discussion of this alleged disparity in sentencing was that the District Court noted that it was required to ‘consider a fairness with regard to other offenders who are sentenced by the Court.’”). The Third Circuit held this was procedural error, stating that “[t]he District Court must address whether there is a sentencing disparity because there is no explicit discussion or indication in the record that it was considered.” *Id.* On remand, the district court resentenced the defendant to 24 months.

In *United States v. DeYoung*, 571 F. App’x 231 (4th Cir. 2014) (unpublished per curiam op.), the defendant was convicted of conspiracy to distribute and to possess with intent to distribute oxycodone. *Id.* at 232. At sentencing, she requested that the district court give her the same benefit of a reduction in drug weight that the government recommended for her co-defendant at his sentencing. *Id.* at 234. The district court rejected that request and sentenced the defendant to the bottom of the advisory Guidelines range, imposing a sentence of 70 months’ imprisonment – the same sentence received by the co-defendant. *Id.* The Fourth Circuit held that although the defendant’s sentence was within the Guidelines range, the sentencing

“court erred by ignoring her nonfrivolous arguments for a different sentence and failing to explain the sentencing choice,” and that the outcome of this error was that “[w]hile the co-defendant was more culpable, he received the same sentence.” *Id.* (internal quotation marks omitted). As in *Friedman*, the Court of Appeals found this was “procedurally unreasonable,” *id.* at 233, and remanded for resentencing. On remand, the defendant received a sentence of time served, which at that time was 15 months.

These cases – and the others contained in the Appendix, *infra* – support the commonsense notion that when district courts consider all the relevant factors to sentencing, including the need to avoid unwarranted disparities, the sentences imposed are less harsh, more equitable, and fairer overall. When courts consider all of the § 3553(a) factors in addition to calculating the Sentencing Guidelines, they fulfill their statutory role of imposing punishments that are sufficient, but not greater than necessary, to achieve the purposes of sentencing. The Seventh Circuit’s rule in this case undermines this Court’s line of precedents since *Booker* of requiring individualized sentencing, consistent with the dictates of Congress and the Constitution. The Court should therefore grant certiorari to consider whether correction of the decision below would advance the goals of fairer sentencing practices that appropriately treat similarly-situated defendants alike and those with varying levels of culpability differently.

B. The Court Should Grant Certiorari Because the Seventh Circuit’s Decision Is Untenable and Exacerbates an Existing Circuit Split

The Court should also grant certiorari because the decision below disregards the unambiguous text of 18 U.S.C. § 3553(a) and this Court’s clear precedents interpreting that statute, as well as the overall sentencing framework the Court has adopted and painstakingly developed since *Booker*. In so doing, it exacerbates a circuit split that this Court should resolve.

The statute states, in clear and express terms, that courts, “in determining the particular sentence to be imposed, *shall consider* . . . the need to avoid unwarranted disparities among defendants.” 18 U.S.C. § 3553(a) (6) (emphasis added). That mandatory language has prompted this Court to hold that “[t]he Act *requires* judges to consider” the § 3553(a) factors, including “the need to avoid unwarranted sentencing disparities.” *Booker*, 543 U.S. at 259–60 (emphasis added) (internal quotation marks omitted); *see also Kimbrough v. United States*, 552 U.S. 85, 108 (2007) (“Section 3553(a)(6) *directs* district courts to consider the need to avoid unwarranted disparities.” (emphasis added)).

The Seventh Circuit’s contrary rule flouts the “double determination” principle this Court announced in *Rita*, whereby the sentencing court and the Sentencing Commission each have an independent obligation to achieve sentencing outcomes consistent with § 3553(a). Indeed, because the Guidelines themselves are intended to reflect the Sentencing Commission’s application of the § 3553(a) factors, if the Seventh Circuit were correct,

there would be no reason at all for sentencing courts to contemplate sentences outside the Guidelines range based on any of the statutory factors, let alone the need to avoid unwarranted disparities. But this Court has never held that sentencing courts may presume that the Guidelines are reasonable or otherwise ignore the § 3553(a) factors after calculating the Guidelines. *See Rita*, 551 U.S. at 351 (noting that presumption of reasonableness of Guidelines sentences “is an *appellate* court presumption” only). Rather, as the Court has made clear time and again since *Booker*, a court’s duty to consider § 3553(a)(6) does not depend on whether it ultimately imposes a Guidelines sentence, because consideration of the § 3553(a) factors is required for *every* sentence. Though the Guidelines provide a starting point, district courts are required to impose sentences that are *individualized*, and fulfilling this duty requires a court to consider all of the § 3553(a) factors to determine if a Guidelines sentence is reasonable for the individual defendant. *See Gall*, 552 U.S. at 50 (courts must “make an individualized assessment based on the facts presented”); *accord Pepper v. United States*, 562 U.S. 476, 487-88 (2011) (“[H]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.” (internal quotation marks omitted)). Moreover, even if a sentence is within the Guidelines, simply citing the Guidelines does not explain the basis for a defendant’s sentence, because the Guidelines provide no information as to why the judge sentenced a defendant to a particular term (*i.e.*, in the bottom, middle, or top) of the Guidelines range.

To the extent the Seventh Circuit relied on *Gall*, it overread language in this Court’s decision and ignored the circumstances of the case. The Court noted in *Gall* that, based on the colloquy between the district judge and prosecutor at sentencing, “it is perfectly clear that the District Judge considered the need to avoid unwarranted disparities, but also considered the need to avoid unwarranted *similarities* among other co-conspirators who were not similarly situated.” *Gall*, 552 U.S. at 55. Thus, *Gall* affirmed the district court’s recognition that a within-Guidelines sentence can *create* an unwarranted disparity, which was the basis for the district court’s variance below the 30-37 month Guidelines range in that case to a term of probation. *See id.* at 593. The decision below missed this point. Far from supporting any abdication of the court’s responsibility to consider the § 3553(a) factors independently of the Guidelines, *Gall* is a case-study in why such consideration is necessary for fair sentencing outcomes.

Most courts of appeals have recognized the import of *Gall* and the “double determination” function set forth in *Rita*. *See, e.g., United States v. Corsey*, 723 F.3d 366, 377 (2d Cir. 2013); *Friedman*, 658 F.3d at 362; *United States v. Lynn*, 592 F.3d 572, 583-84 (4th Cir. 2010); *United States v. Mondragon-Santiago*, 564 F.3d 357, 362-64 (5th Cir. 2009); *United States v. Trujillo*, 713 F.3d 1003, 1010-11 (9th Cir. 2013). But in holding that the district court need not consider each non-frivolous argument a defendant makes pursuant to § 3553(a), the Seventh Circuit joined a small but obstinate minority of circuit courts that have adhered to rigid deference to the Guidelines by reasoning that “the Guidelines themselves seek, in some measure, to give meaning to the considerations embodied in Section 3553(a).” *United States v. Ruiz-Terrazas*, 477 F.3d 1196,

1200 (10th Cir. 2007) (Gorsuch, J.); *accord United States v. Wireman*, 849 F.3d 956, 963 (10th Cir. 2017) (holding that “the district court need not specifically address and instead may functionally reject a defendant’s arguments for leniency when it sentences him within the Guidelines range”). The Court should grant certiorari to resolve the circuit split and make clear that the mandatory language of the statute governs.

CONCLUSION

For the reasons set forth above, the Center respectfully urges the Court to grant the petition for certiorari and conclude that the Seventh Circuit erred in holding that a district court need not consider sentencing disparity pursuant to 18 U.S.C. § 3553(a)(6) when sentencing a defendant to a within-Guidelines sentence.

Respectfully submitted,

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APPENDIX

**APPENDIX — CASES IDENTIFIED IN
THE STUDY INVOLVING UNWARRANTED
SENTENCING DISPARITIES**

- *United States v. Corsey*, 723 F.3d 366 (2d Cir. 2013)
– Three Defendants: one sentence unchanged at 240 months, one reduced from 240 to 180 months, one reduced from 240 to 192 months.
- *United States v. Friedman*, 658 F.3d 342 (3d Cir. 2011) – Sentence reduced from 34 to 24 months.
- *United States v. Lynn*, 592 F.3d 572 (4th Cir. 2010)
– Sentence reduced from 396 months to 360 months.
- *United States v. DeYoung*, 571 F. App'x 231 (4th Cir. 2014) – Sentence reduced from 70 months to 15 months (time served).
- *United States v. Tisdale*, 264 F. App'x 403 (5th Cir. 2008) – Two defendants, one sentence reduced from 97 to 72 months, one reduced from 97 to 84 months.
- *United States v. Ferguson*, 518 F. App'x 458 (6th Cir. 2013) – Sentence reduced from 200 to 140 months.
- *United States v. Fenderson*, 354 F. App'x 236, 238 (6th Cir. 2009) – Sentence reduced from 262 months to 244 months.
- *United States v. Johnson*, 635 F.3d 983 (7th Cir. 2011) – Sentence reduced from life to 293 months.

Appendix

- *United States v. Panice*, 598 F.3d 426, 443 (7th Cir. 2010) – Sentence reduced from 360 to 132 months.
- *United States v. Smith*, 573 F.3d 539, 643 (8th Cir. 2009) – Sentence reduced from 360 to 240 months.